No. 48025-0-II

COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

CITY OF EDGEWOOD, Appellant

vs.

HAIST, LLC, et. Al, Respondents

OPENING BRIEF OF PETITIONERS ERIC DOCKEN, DOCKEN PROPERTIES, LP; ENID AND EDWARD DUNCAN; JAMES AND PATRICIA SCHMIDT; DARLENE MASTERS; AKA THE BRICKHOUSE, LLC; SUELO MARINA, LLC

CAROLYN A. LAKE , WSBA 13980
Seth Goodstein, WSBA #45091
Attorney for Petitioners Docken, et al
501 South G Street
Tacoma, Washington 98405
(253) 779-4000

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

I. PETITIONERS DOCKEN'S STATEMENT OF ISSUES & ASSIGNMENTS OF ERROR

1. Did the City deprive appellants of property without due process of law when City imposed assessments against properties which did not receive a special benefit from the improvements? YES.

2. Does the record support that the City assessments were founded on a fundamentally wrong basis and or that the decision of the City Council was arbitrary and capricious? YES.

a. Are City assessments flawed when City assessments were imposed on properties already at their highest and best use and received no special benefit from the improvement? **YES. (Issue No.2)**

b. Are City assessments flawed when amount of assessments imposed exceeds the actual special benefits which each property received as a result of the public improvement? **YES. (Issue No.2)**

c. Did the City impermissibly impose disproportionate assessments where certain properties bore proportionately more than their share of the total parcels, relative to the other parcels in the LID? **YES. (Issue No.2)**

d. Are City assessments flawed where assessment presumes 100% of each site enjoys special benefit without reduction for portions of site that cannot be developed under City's code? **YES. (Issue No.2)**

e. Are City assessments flawed when the cost of modification to particular parcels needed to enjoy the sewer improvement not deducted as set off from the special assessment value? **YES. (Issue No.2)**

e. Do City assessments fail for being arbitrary and capricious where assessments simply distributes improvement costs

and does not take into account the actual special benefit conferred in each parcel? **YES. (Issue No.2)**

f. Are City Assessments flawed when based on unsubstantiated "Test of Reasonableness" and "Test" criterion do not apply to the properties assessed? Are City assessments flawed when based on presumed benefit to land that is not actual, physical or material, but instead is merely speculative and conjectural? **YES. (Issue No.2)**

g. Are City assessments flawed when assessments are based on possible, future integrated use of separate parcels of land and properties were not valued as existing, single tracts of land? **YES. (Issue No.2)**

3. When reviewing challenged assessments, is the standard to be applied one of clear cogent and convincing evidence? YES.

4. Once property owners present evidenced on the issue of special benefits and the presumptions in favor of a municipality disappears, did the City meet its burden to introduce competent evidence of benefit when the City presented no rebuttal evidence after property owners' presentation? NO.

5. Where City' 2011 LID process was found to be unconstitutional and remanded, did City's admission and use of property owner statements from the flawed 2011 hearing violate property owners constitutional rights and taint the hearing on remand? YES.

6. Did the attendance in LID executive session by LID proponent City Manager while said Manager was being personally sued by the property owners violate Appearance of Fairness Doctrine? YES.

II. INTRODUCTION / SUMMARY

The Petitioner/Property Owners appeal purported sewer assessments for City of Edgewood Local Improvement District ("LID") No. 1. The LID, Edgewood's first since its incorporation a decade ago, is fatally flawed due to failure to provide process due, a significant violation of the appearance of fairness doctrine as codified by RCW 42.30, flawed and or untenable valuation methodology, and assessments that outstrip benefits.

This Court can correct, change, modify, or annul the assessment. RCW 35.44.250. The Docken Petitioners respectfully request that this Court lower the subject assessments to correct values supported by clear, cogent and convincing evidence and described and analyzed herein. Now on its second appeal to the Courts, the City has proven unable to execute the procedures set forth in RCW 35.44, unwilling to execute the procedures set forth in RCW 35.44, or both.

This is a second round of assessments against the Petitioners' properties. In 2011, the first charged that the Petitioners now-annulled assessments were based upon bad assumptions and or hypothetical conditions, and the city's flawed process deprived the property owners of property rights guaranteed

by the state and federal constitutions. The property owners were correct.

This Court of Appeals annulled the 2011 assessments. *Hasit v. City of Edgewood* Slip Op. AR 42-78. In the intervening four years, no property owner has come close to realizing the appreciated "after" value forecasted in 2011 by the City's Consultant to underpin the City's now-annulled cost distribution. In fact, each of the Docken Appellants' assessed land values has decreased, and **decreased by a collective total of $571,300** due to the blight of the City's bloated assessments. *See Assessor Data*, attached to *Dec'l Property Owners*, AR 821-826, 832-833, 838-841.

Despite the passage of over 4 years, and 2 court rulings against the city, the City Consultant's current "special benefits" are remain bit as unrealistic as what the Docken Petitioners were assessed in 2011.

The City Consultant now recommends the Docken Petitioners collectively *pay* $1,194,665 in assessments, despite having actually lost more than $500,000 in property value between 2011 and 2014. *Assessment Role.* AR 12-13. The Docken Petitioners will herein establish the City has again overreached in assigning special benefits.

- The City's Consultant's own work expressly establishes that many of the Docken Petitioners' land uses already constitute the highest and best use, **before** the sewer installation. *See, e.g., City Restricted Report* 78. AR. 3177: "Highest and best use...The existing improvements are an example of the site's highest and best use." The City's own conclusion of highest and best use does not support that sewer being available to these properties would increase the value.
- Thus on the City's own conclusion, the corresponding Special Benefit assessment for these parcels would be minimal or zero.
- The City's Consultant charges for development that cannot take place - i.e. assuming full build-out of median strips, setbacks, parking lots, etc. required to be set aside by Edgewood's Municipal Code. *City Summary Presentation*, AR 217-233.
- The City's Consultant makes use of a "test of reasonableness" standard that does not actually exist, is wholly unsupported, cannot be used to supplant the statutory zone-and-termini appraisal method, and will not survive scrutiny. *City Restricted Report* 247. AR 3211.
- Further, in most cases, the City Consultant's value applied to the Docken Petitioners' Properties exceeds, sometimes vastly, the City Consultant's own "Test of Reasonableness" values. *Id.*
- The City's Consultant also charges for development within areas that Edgewood staff has previously designated for critical area protection and cannot be developed, due to City regulations. *City Restricted Report* 15-16. AR 3114-3115.
- The City's Consultant double-counts the alleged value of the assessment as to the Docken properties. The consultant cites to several pending sales of unrelated properties within the LID that have already been assessed. Then, the consultant adds the dollar amount of the LID assessment for the pending property to the pending sale price of the property. The Consultant uses that artificial summation as the value for the Petitioners' clients' properties, and then adding *again* the alleged

value of the improvements. This is tantamount to adding the next twenty years' property taxes to a property's value; untenable. *City Restricted Report* 243. AR 3341. And then, the Consultant charges the property owners *even more* than his artificially high values.

- The City Consultant calculates a maximum value of the assessment, and then overcharges the Docken Petitioners outside the range of the range of possibilities set forth in the City's own materials. *City Restricted Report* 244-246. 3342-3344.
- City continues to use after the fact, post-sewer improvement zoning changes to use to artificially inflate the LID special benefit amount. *City Restricted Report*, cover letter 3. AR 3098.

The combined effect of these errors and miscalculations means that Edgewood's valuation study must be disregarded. Edgewood did not overcome, nor seriously attempt to overcome, the testimony of the property owner's expert who testified as to the lack of special benefits and errors and critical omissions of the City Consultant. Edgewood instead disregarded the property owners protests without explanation. The proposed adoption of the confirmation ordinance is without factual and legal basis, and therefore arbitrary and capricious.

III. PETITIONERS DOCKEN'S STATEMENT OF FACTS[1]

The Following Petitioners own Property in the LID Area:

1. Enid and Edward Duncan: LID Parcel 2 tax parcel 420032021. *Findings of Fact, Conclusions of Law, and Order (Assessment Role)* 4. AR 10.

[1] AR refers to Administrative Record on file with the Court.

2. The Suelo Marina, LLC: LID Parcel 31 tax parcel 420033140. *Id.*

3. Schmidt/Masters, owners of the following parcels:
   a. LID Parcel 71 tax parcel 420091012;
   b. LID Parcel 79 tax parcel 420091051. *Id.*

4. AKA the Brickhouse, LLC: LID Parcel 128 tax parcel 3625000373. *Id.*

5. Eric Docken and Docken Properties LP, owners of the following parcels:
   a. LID Parcel 131 tax parcel 0420094080;
   b. LID Parcel 133 tax parcel 0420094023;
   c. LID parcel 140 tax parcel 0420094079. *Id.*

Background: Formation of LID No. 1 and Sewer Construction (2008 – 2011). Washington cities and towns may form local improvement districts (LIDs) or utility local improvement districts (ULIDs) as authorized by RCW 35.43.040 and .042. Within an LID, local governments may impose special assessments on property owners to pay for certain improvements only if those improvements actually, specially benefit those properties. Special benefit is defined as the increase to the existing property attributable to the local improvements. See, 14 McQuillin, Municipal Corporations, §38.02 (3rd Ed.).

The Edgewood City Council originally created this Local Improvement District (LID) No. 1 in October of 2008. *Assessment Role* 3. AR 9. Some property owners petitioned for the creation of

the LID, but only after the property owners consulted with individuals experienced in building sewers in the local area. The residents initially concluded that a sewer could be built to serve Edgewood for $5,000,000. *Docken Br.* 3. AR 788. By the time the residents submitted the LID petition to the City, the residents understood the cost could be as high as $7,000,000. *Id.* This $7,000,000 gave the residents pause, but did not terminate the Petition. *Id.*

The City constructed the sewer for $21,238,268.00. *Assessment Role*, AR 25-26. A portion of this cost resulted from oversizing the sewer to accommodate for outflows from future property owners outside the LID that would connect to the system in the future. AR 117-177. On April 12, 2011, the Council accepted the sewer as complete. *Assessment Role* 3. AR 9. Later, on May 10, 2011, the City adopted sweeping zoning changes that greatly and artificially inflated the density of the LID properties. *City Consultant June 20, 2014 Letter* 3 AR 23. The City's Consultant admittedly uses the inflated density as a basis for the "after-LID improvement value". *Id.*

2011 Assessment. In October of 2009, the City retained the services of Macaulay and Associates to assess special benefits of the

properties in LID No. 1. The City imposed the entire $21,238,268 cost of the LID #1 on the owners of 161 parcels in a 312 acre area. *Assessment Role,* AR 25-26. By letter dated April 20, 2011, the City provided "general information" concerning the assessment roll, informing of a June 1, 2011 hearing on the assessment role. AR 25-26. The City Council delegated its authority to hold a hearing on the assessment role to a Hearing Examiner. *Id.* On May 12, 2011, the City provided official notice of the assessment. AR 1192. The May 12, 2011 notice included what specific amounts were proposed to be assessed against the properties, and set a public hearing on the assessment role for June 1, 2011. *Id.*

On May 27, 2011, Docken Properties, LP, requested the City continue the hearing due to defective City notice. *Appellant Letter* AR 1868-1870. The City denied the request in writing. *City Letter* AR 1872-1874. At the June 1, 2011 hearing, Mr. Docken orally renewed his request to reset the hearing. *Speaking Points for Mr. Docken* AR 2506-2510. The City again denied Mr. Docken's request to reset the hearing.

On June 30, 2011, the City's Hearing Examiner issued his report and recommendation to the City Council. *Hrg. Examiner Report.* AR 1060-1078. The City's Hearing Examiner applied

various presumptions in favor of the City's proposed assessment role. *Id.* The City's Hearing Examiner recommended adopting three changes suggested by the City's Macaulay and Associates firm, and otherwise rejected all other protests entirely. *Id.*

On July 19, 2011, the City Council sat purportedly as a board of equalization to hear appeals of the City's Hearing Examiner's Ruling. *Notice of Meeting*. AR 3045-3047. The City Council had allowed three minutes of argument for each appeal. *Id.* Each of the Docken Appellants participated in the hearing. *City Attorney Letter*. AR 3049-3055. The City Council moved to confirm the assessment role as recommended by the City's Hearing Examiner with minor changes. This failed to pass. The City Council heard from City staff regarding the consequences of not approving the assessment role, and then re-voted to pass the assessment role. *Ord. 11-0366*. AR 3058-3059.

Appeal to Superior Court (2011).Pursuant to RCW 35.44.250, each of the Docken Appellants appealed the City Council's assessment role to the Pierce County Superior Court. *Hasit Opinion* 8. AR 60. The Court sided with the property owners, finding many defects with the City's procedures resulted in an unfair process. AR 77-78. The defects pointed out in the

Superior Court's ruling include:

- The City's Notice did not provide property owners adequate time to hire an independent appraiser, and the property owners were provided no advance notice that evidence submitted without an appraiser present would not be considered.
- The Examiner did not act as a neutral fact finder, because he presumed the City's Macaulay and Associates report valid.
- The Examiner misapplied presumptions in order not to consider and or automatically dismiss property owner testimony.

Transcript of Court's Ruling. The Superior Court ordered a new hearing on the assessments, with instructions to the City on its procedures.

Appeal to the Court of Appeals (2011-2014)

In November of 2011, the City appealed the Superior Court's ruling. *Hasit Op.* 8. AR 49. The Docken Appellants cross-appealed; asking the Court of Appeals to expand the relief of a new, more fair hearing, to all of the LID property owners. *Hasit Opinion* 8, 37. AR Vol. 1 49, 78. In March of 2014, the Court of Appeals issued its ruling in a Published Opinion in favor of the Property

Owners. *Hasit Op.* AR 42-78. The Court of Appeals Opinion went further than the Superior Court. *Id.* The Court of Appeals specified that the "unfairness" of the City process violated the Docken Appellants' rights under the State and Federal Constitutions. *Id.* The Court of Appeals annulled the assessments, rather than instruct a new hearing. *Id.* The Court of Appeals also ruled[2] that the City could not pass on charges related to oversizing of the sewer to the Docken Appellants'.

The Court of Appeals called out a number of defects in the City process, including:

- The City shunned alternative financing methods, like latecomer agreements, because it did not have the money to shift costs in an acceptable manner – rendering the assessment fundamentally wrong.
- The City's denial of the protests based on the protestors' failure to present evidence that the City told the protestors they could not present [expert testimony] was unquestionably willful and unreasoning action by the City, taken without regard to the facts and circumstances.

[2] The Court declined to expand relief to all LID property owners.

- The City's consideration only of expert evidence violated the plain meaning of Washington State precedent.
- The Appellants' lack of expert appraisal evidence did not activate any presumptions against the Appellants.
- The City applied an incorrect burden to the Appellants by requiring the Appellants prove the City's assessments were calculated on a fundamentally wrong basis or arbitrary and capricious. These standards apply only to appellate review.
- Instead the standard to be applied is clear, cogent, and convincing evidence

Hasit Op. AR 42-78.

Since the Court determined that that City's defective process defeated the 2011 assessments, the Court did not need to decide the Petitioners' substantive arguments about the unfairness of the assessments.

Re-assessment (2014). The Court of Appeals Ruling became final and binding upon the parties in 2014. The 2011 assessments ceased to exist as to the Docken Petitioners 'properties.

By letter dated April 24, 2014, the City provided a letter to the Docken Petitioners acknowledging the Court of Appeals Ruling as final, and that the City would prepare a revised assessment role

as to the Docken Petitioners. AR 98-100.

By Report dated June 17, 2014, the City's contractors, BHC Consultants and Tetra Tech, concluded that the City spent $805,687 on oversizing the sewer. AR 117-177. These charges should not have been assessed for any LID properties. To correct this overcharge as to LID property owners, the City now has calculated its recommended assessment for each property, then applied a discount of .709. *City Consultant Letter*. AR 23.

By Report dated June 20, 2014, the City's Macaulay Associates consultant provided revised assessments of the Docken Petitioners properties ("City Report"), as summarized below:

Name	Tax Parcel	2014 LID No.	2011 Assessment
Docken Properties LP	420094080	131	$ 159,188.00
Docken Properties LP	420094023	133	$ 68,539.00
Docken Properties LP	420094079	140	$ 28,476.00
Duncan	420032021	2	$ 441,000.00
Schmidt/Masters	420091012	79	$ 341,221.00
Schmidt/Masters	420091051	71	$ 104,651.00
AKA the Brickhouse	3625000373	128	$ 34,638.00

AR 3095-3103. The City Council ultimately set a date of September 17, 2014 for a new LID hearing, should the property owners wish to protest their assessments. AR 96. The Dockens Petitioners' attorney objected to the September 17th hearing, as several owners

of property are unavailable. The City declined to reset the hearing. *Docken Br.* 8. AR 793.

The Docken Petitioners appeared at the September 17, 2014 hearing before the City Council. In support of the appearance, the Docken Petitioners submitted a written protest AR 786-815, property-specific declarations of the property owners AR EX 17-20, and Declaration and Appraisal Report of MAI-certified appraiser Donald Heischmann, AR 1031-1051.

The Protest hearing called to Order and took approximately four hours. *TR of City Sept. 17 Council Meeting*. AR 609-777. Following the protest hearing, the City Council retreated to an executive session. *Id.* This executive session was attended by (former) City Manager Mark Bauer. The City Council emerged from executive session to announce that no decision would issue on that night of September 17.

The City Council re-convened executive session on October 2, 2014. *TR of City Oct. 2 Council Meeting*. AR 778-782. As a result of that meeting, Council instructed staff to prepare an ordinance affirming the staff-recommended assessments, and categorically ignoring each of the property owners' protests.

The City passed Ordinance 14-0424, confirming the City Consultant's recommended assessments. AR 1-4. All property owners appealed this result.

IV. AUTHORITY & ARGUMENT

A. Outline Of The Lid Assessment & Objection Process

Outline of the LID Assessment & Objection Process

1. A Local Improvement Districts (LID) is statutorily created under RCW 35.43 and 35.44.
2. RCW 35.43 governs the formation of the district.
3. Once the district is formed, a City may assess LID property owners pursuant to RCW 35.44.
4. A city may only assess property within the LID in an amount not to exceed the actual special benefits which each property receives as a result of the public improvement. RCW 35.44.010.
5. The City shall calculate the LID assessments using the zone and termini method, unless the legislature of the public agency determines another valuation method "more fairly reflects" the special benefit. RCW 35.44.047.
6. The City is required to enter the total assessments ascertained against each parcel upon an assessment role. RCW 35.44.050.

7. Prior to entering the assessments, the municipality's legislative body, or some committee or officer designated by the legislative body shall hold a hearing to consider objections. RCW 35.44.070.
8. As a result of the assessment hearing, state law provides that the hearing official or officials may correct, revise, lower, change, or modify the assessment roll or any part thereof, or set aside the roll and order the assessment to be made de novo, and at the conclusion confirm the role by ordinance. RCW 35.44.100.
9. The City is required to provide property owners of record notice of the LID assessment hearing by mail sent at least fifteen days prior to the hearing, and published at least once a week for two weeks in the official newspaper of the city or town, the last publication to be at least fifteen days before the date fixed for hearing. RCW 35.44.090.
10. The objection procedure shall be set by ordinance, and that ordinance shall be included in the mailed notice of hearing. RCW 35.44.070.
11. Following the assessment role hearing, the City council must fix a time for hearing objections to confirmation of the assessment role. RCW 35.44.100. Only those who partook in the hearing on

the final assessment role may object to confirmation of the assessment role. RCW 35.44.110.

12. Following confirmation of an assessment role by ordinance, protesters may perfect an appeal to the superior court of the county in which the town is situated. RCW 35.44.200.
13. An entirely different basis for the superior court to review confirmation of an LID assessment role invokes the superior court's inherent, or constitutional jurisdiction. *See Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 119 P.3d 325 (2005).
14. An assessment role review proceeding under the superior court's constitutional jurisdiction is called a jurisdictional challenge. *Id.*
15. Jurisdictional challenges are not governed by RCW 35.44. *Id.*

RCW Chapter 35.43 authorizes local governments to use LID assessments to finance public improvements, including sewers. *City of Edmonds v. Williams*, 54 Wash. App. 632, 635-36, 774 P.2d 1241, 1243 (Div. 1, 1989); RCW 35.43.040. The Opinion in *Hasit LLC v. City of Edgewood (Local Improvement Dist. #1)*, 179 Wash. App. 917, 932-33, 320 P.3d 163, 171 (2014) "sets forth the relevant

principles governing LID assessments in some detail...." *Hasit* provides the following guidance.

> Within a local improvement or related district, local governments may impose special assessments on property owners to pay for certain improvements that specially benefit those properties. *Covell v. City of Seattle*, 127 Wash.2d 874, 889, 905 P.2d 324 (1995). "Special benefit" is "the increase in fair market value attributable to the local improvements." *Doolittle v. City of Everett*, 114 Wash.2d 88, 103, 786 P.2d 253 (1990).
>
> An assessment against property which does not receive a special benefit from the improvement constitutes a "depriv[ation] of property without due process of law." Heavens, 66 Wash.2d at 564, 404 P.2d 453. To be subject to an LID assessment, a property must realize a benefit that is "actual, physical and material[,] ... not merely speculative or conjectural," and that is "substantially more intense than [the benefit] to the rest of the municipality." Heavens, 66 Wash.2d at 563, 404 P.2d 453. Consistently with this rule, a special assessment may not substantially exceed a property's special benefit. *In re Local Improvement No. 6097*, 52 Wash.2d 330, 333, 324 P.2d 1078 (1958). Furthermore, a property should not bear "proportionately more than its share" of the total assessment relative to other parcels in the LID. *Cammack v. Port Angeles*, 15 Wash.App. 188, 196, 548 P.2d 571 (1976) (citing *Sterling Realty Co. v. Bellevue*, 68 Wash.2d 760, 415 P.2d 627 (1966)).

AR 50-51.

City Council's Role in the LID Process. The City Council sits as a board of equalization to hear any objections to the assessment role, or may delegate this duty to committee or an officer. RCW

35.44.080. In cases such as this, where the City Council does not delegate the LID hearing, at the time and place fixed and at times to which the hearing may be adjourned, the council will sit as a board of equalization for the purpose of considering the roll. RCW 35.44.080(2). The City Council exercises the following authority as a board of equalization: "At the time fixed for hearing objections to the confirmation of the assessment roll, and at the times to which the hearing may be adjourned, the council may correct, revise, raise, lower, change, or modify the roll or any part thereof, or set aside the roll and order the assessment to be made de novo and at the conclusion thereof confirm the roll by ordinance." RCW 35.44.100.

Hasit provides the following guidance:

> Because LID assessments involve a deprivation of property, affected owners have the right to a hearing as to whether the improvement resulted in special benefits to their properties and whether their assessments are proportionate, which necessarily includes the right to adequate notice of the hearing. *Carlisle v. Columbia Irrigation Dist.*, 168 Wash.2d 555, 569–70, 229 P.3d 761 (2010). The LID statute specifies that cities must mail notices giving the time and place of the hearing to the affected owners "[a]t least fifteen days before" the hearing and publish the notice once a week for two consecutive weeks in the city's official newspaper, with the final publication at least fifteen days prior to the hearing. RCW 35.44.090.

> The city council may designate an officer to conduct hearings on proposed assessments. RCW 35.44.070. The hearings officer considers all objections and evidence and makes a recommendation to the city council. The council, serving as a board of equalization, may either adopt or reject the officer's recommendations and may accept, revise, or reject the assessments in whole or in part. RCW 35.44.070, .080(2), (3).

AR 51.

Reviewing Court's Role

A reviewing court reviews the record before the City Council *de novo*. The LID statute provides very specific procedures to seek superior court review of a municipal LID determination. RCW 35.44.200-250. An RCW 35.44 statutory[3] petition "must be filed within ten days"[4], is closed record[5], fast-tracked[6], carries no jury

[3] RCW 35.44.200: The decision of the council or other legislative body, upon any objections made in the manner and within the time herein prescribed, shall be final and conclusive, subject however to review by the superior court upon appeal. The appeal shall be made by filing written notice of appeal with the city or town clerk and with the clerk of the superior court of the county in which the city or town is situated.

[4] RCW 35.44.210: The notice of appeal must be filed within ten days after the ordinance confirming the assessment roll becomes effective and shall describe the property and set forth the objections of the appellant to the assessment.

[5] 35.44.230

[6] RCW 35.44.250: At the time fixed for hearing in the notice thereof or at such further time as may be fixed by the court, the superior court shall hear and determine the appeal without a jury and the cause shall have preference over all other civil causes except proceedings relating to eminent domain in cities and towns and actions of forcible entry and detainer. The judgment of the court shall confirm, unless the court shall find from the evidence that such assessment is founded upon a fundamentally wrong basis and/or the decision of the council or other legislative body thereon was arbitrary or capricious; in which event the judgment of the court shall correct, change, modify, or annul the assessment insofar as it affects the property of the appellant.

entitlement[7], and limits the court to four[8] possible outcomes. RCW 35.44 does not govern jurisdictional challenges.

Hasit provides the following guidance:

> The decision of the Council may be appealed to superior court. RCW 35.44.200. The court may "correct, change, modify, or annul the assessment insofar as it affects the property of the appellant" if it finds from the evidence that the "assessment is founded upon a fundamentally wrong basis and/or the decision of the council was arbitrary or capricious." RCW 35.44.250. An assessment is founded on a fundamentally wrong basis where the method of assessment or the procedures used by the city involve " 'some error ..., the nature of which is so fundamental as to necessitate a nullification of the entire LID, as opposed to a modification of the assessment as to particular property.' " *Abbenhaus*, 89 Wash.2d at 859, 576 P.2d 888. Even if a challenger establishes such a fundamental error, however, "the court is limited to nullification or modification only of those parcel assessments before it." *Abbenhaus*, 89 Wash.2d at 859, 576 P.2d 888. Courts consider a municipality's decision regarding an LID assessment arbitrary and capricious only if it constitutes willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action. Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous. *Abbenhaus*, 89 Wash.2d at 858–59, 576 P.2d 888. Courts may also annul an assessment if imposed through an unconstitutional procedure. *See Pratt v. Water Dist. No. 79*, 58 Wash.2d 420, 423, 363 P.2d 816 (1961).

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[7] *Id.*
[8] *Id.*

> In applying these standards, courts may consider only "the record of proceedings before the City Council." Doolittle, 114 Wash.2d at 93, 786 P.2d 253 (citing Abbenhaus, 89 Wash.2d at 859, 576 P.2d 888). An owner challenging the assessment bears the burden of production, and the court will presume that the action of the city council was legal and proper. *Doolittle*, 114 Wash.2d at 93, 786 P.2d 253 (citing Abbenhaus, 89 Wash.2d at 860–61, 576 P.2d 888). Furthermore, a reviewing court must " 'presume [ ] that an improvement is a benefit; that an assessment is no greater than the benefit; that an assessment is equal or ratable to an assessment upon other property similarly situated; and that the assessment is fair.' " *Abbenhaus*, 89 Wash.2d at 861, 576 P.2d 888 (quoting Phillip Trautman, Assessments in Washington, 40 Wash. L.Rev.. 100, 118 (1965)).

AR 52-53.

Evidentiary Standard of Review and Presumptions Applicable. The principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement . . . ." *Norwood v. Baker*, 172 U.S. 269, 278-279; 19 S.Ct. 187, 190; 43 L. Ed. 443, 447 (1898).

"It is presumed that an improvement is a benefit; that an assessment is equal or ratable to an assessment upon other property similarly situated; and that the assessment is fair." Trautman, Assessments in Washington, 40 Wash. L. Rev. 100, 122

(1965). *See Sterling Realty Co. v. Bellevue*, 68 Wn.2d 760, 765, 415 P.2d 627 (1966). **If testimony on the issue of special benefits is produced by the property owner, the presumptions in favor of a municipality disappear.** "Presumptions are the `bats of the law, flitting in the twilight but disappearing in the sunshine of actual facts.'" *In re Indian Trail Trunk Sewer Sys.*, 35 Wn. App. 840, 843, 670 P.2d 675 (1983), *review denied*, 100 Wn.2d 1037 (1984);quoting *Mackowik v. Kansas City, St. J & C.B. R.R. Co.*, 94 S.W. 256, 262 (Mo. 1906). Once a property owner produces competent testimony sufficient to rebut the presumptions in favor of the municipality, the burden shifts back to the municipality to introduce competent evidence of benefit. *Id.* If it fails to do so, its assessment will and should be nullified. *Bellevue Plaza, Inc. v. City of Bellevue*,121 Wn.2d 397, 418, 851 P.2d 662 (1993).

The amount of the special assessment may not exceed the special benefit which is enjoyed by a specific parcel. "Under the local improvement district statutes, only that portion of the cost of the local improvement which is of special benefit to the property can be levied against the property. . . . Property not benefited by local improvement may not be assessed, and special assessments

for special benefits cannot substantially exceed the amount of the special benefits... The amount of the special benefits attaching to the property, by reason of the local improvements, is the difference between the fair market value of the property immediately after the special benefits have attached, and the fair market value of the property before the benefits have attached." (Emphasis in original.) *In re Schmitz*, 44 Wn.2d 429, 433-34, 268 P.2d 436 (1954). *Hasit* provides the following guidance.

> Whether a property received a special benefit and the amount of the benefit ordinarily present questions of fact. *Bellevue Assoc.*, 108 Wash.2d at 676–77, 741 P.2d 993 (citing *In re: Jones*, 52 Wash.2d 143, 146, 324 P.2d 259 (1958))17 ¶ 27
>
> These presumptions, however, merely " 'establish which party has the burden of going forward with evidence,' " and when " 'the other party adduces credible evidence to the contrary,' " the burden shifts to the city. *Bellevue Plaza, Inc. v. City of Bellevue*, 121 Wash.2d 397, 403, 851 P.2d 662 (1993) (*quoting In re Indian Trail Trunk Sewer Sys.*, 35 Wash.App. 840, 843, 670 P.2d 675 (1983)). Thus, where a protesting owner alleges her assessment exceeds the special benefit and presents sufficient evidence to overcome the presumptions, but the city confirms the assessment roll regardless, a court will reduce or annul the assessment as arbitrary and capricious unless the city presented sufficient competent evidence to the contrary. *Bellevue Plaza*, 121 Wash.2d at 403–04, 851 P.2d 662.

AR 52-53.

Establishment of an Erroneous Assessment

The property owners may establish an erroneous assessment by the "clear, cogent, and convincing" evidentiary standard. "Any higher evidentiary standard would afford unwanted deference to a report prepared under contract by a private appraisal firm." *Hasit*, AR 66.

"Clear, cogent, and convincing evidence denotes a quantum of proof greater than a mere preponderance of the evidence; it does not require proof beyond a reasonable doubt." *Vermette v. Andersen*, 16 Wn.App. 466, 469 n. 2, 558 P.2d 258 (Div. 2, 1976), *citing Bland v. Mentor*, 63 Wn.2d 150, 385 P.2d 727 (1963). "Clear, cogent, and convincing evidence exists when occurrence of the element has been shown by the evidence to be highly probable. However, it does not mean that the element must be proved by evidence that is convincing beyond a reasonable doubt." 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 160.02 (6th ed.) "Substantial evidence, which by itself is sufficient to satisfy the clear, cogent, and convincing standard, is not made any less substantial by the presence of contradictory testimony" *Vermette* 16 Wn.App. at 470.

B. CITY ASSESSMENT EXCEEDS SPECIAL BENEFIT CONFERRED FOR ALL PARCELS.

The amounts of the City's latest assessments are substantively untenable. The evidence presented established that most properties in this group attained their highest and best use without need for the City's sewer.

The amount of the special assessment may not exceed the special benefit which is enjoyed by a specific parcel. Under the local improvement district statutes, only that portion of the cost of the local improvement which is of special benefit to the property can be levied against the property. . . . Property not benefited by local improvement may not be assessed, and special assessments for special benefits cannot substantially exceed the amount of the special benefits....The amount of the special benefits attaching to the property, by reason of the local improvements, is the difference between the fair market value of the property, the special benefits have attached, and the fair market value of the property before the benefits have attached. *In re Schmitz*, 44 Wn.2d 429, 433-34, 268 P.2d 436 (1954).

The amount of the assessment must be proportionate to other assessments –The method utilized is to assess each parcel of land within the district as nearly as reasonably practicable in

accordance with the special benefits gained by that parcel from the entire improvement, and to assess each parcel its proportionate share in relation to other parcels throughout the improvement district. *Sterling Realty Co. v. City of Bellevue*, 68 Wn.2d 760, 765, 415 P.2d 627 (1966).

The City's assessment fails these two overarching LID assessments criteria as (1) City assessment exceeds the special benefits conferred by the sewer to for most properties, and (2) the City's assessments are not proportional in relation to other parcels within the district.

"It is presumed that an improvement is a benefit; that an assessment is equal or ratable to an assessment upon other property similarly situated; and that the assessment is fair." Trautman, Assessments in Washington, 40 Wash. L. Rev. 100, 122 (1965). *See Sterling Realty Co. v. Bellevue*, 68 Wn.2d 760, 765, 415 P.2d 627 (1966). Here, none of these hold true. The Court should lower, or eliminate the assessments within the range of acceptable choice, which, in some cases, is no assessment at all, based on the City's own Report, and as supplemented by the Property Owners' Appraisers Report (Report of Don Heischman, MAI) and their own Declarations.

C. MAJOR FLAWS IN CITY PROCEDURES

The Court should set aside the assessment role for the following procedural reasons.

1. Admission and Use of 2011 Property Owner Statements Gained in Violation of Property Owners' Constitutional Rights

The Pierce County Superior Court, and then Division II, annulled the first round of the City's attempted assessments against the property owners. *Hasit* found that the compressed and rushed procedures the City used violated the property owners' rights to procedural due process.

In the 2011 assessment, the property owners suggested lowered assessments to the City that the property owners thought would be equitable, given the lack of time that the property owners had to prepare their protest – less than two weeks, with intervening holiday. These suggested assessments were higher than those suggested by the appraiser that the property owners hired, given proper notice. Yet, the City attempted to use and profit from the prior, 2011, statements that the property owners made in the City's illegal assessment proceedings:

> MR. DIJULIO: Mr. Mayor, just one question for Ms. Duncan, please?
> MAYOR EIDINGER: Okay.

> MR. DIJULIO: Ms. Duncan, you understand that the special benefit calculation that was done in 2011 was in the amount of $441,000? Do you recall that?
> MS. DUNCAN: Yes, I do.
> MR. DIJULIO: Okay, And do you recall in your submission to this counsel in July of 2011 a request that the Council reduce your assessment special benefit number from $441,000 to $293,470?
> MS. DUNCAN: I don't recall that.
> MR. DIJULIO: And that is in the letter from your counsel to this city council, the City's Board of Equalization on July 15, 2011, Page 44, for purposes of the record. And 293,470 is only approximately $6,500 apart from Mr. Macaulay's current special benefit assessment, isn't it?
> ...
> MS LAKE: ...The record itself shows that the valuation that the property owner, Ms. Duncan, submitted back in 2011 was the product of the CITY'S extremely compressed time period and lack of notice that was given to the property owners, which courts have ruled violated the property owners' due process.
> So it's wholly unfair for legal counsel to try to use that valuation in today's process...

TR of September 17, 2014 Meeting 51-53. AR 660-662.

Despite this immediate and vigorous objections, the City similarly continued to admit evidence gained in violation of the property owners' rights to due process. Counsel for other appellants similarly objected to such questioning:

> MS. ARCHER: We propose the assessment [on Rempel property] be reduced to $381,925...And I guess I want to address this because it seems to be coming up. Last time around, there was no time to get an appraisal. People were scrambling to come up with their own analysis to address Mr. Macaulay's

> analysis on their own because they didn't have the benefit of an appraiser.
> This is different than the number we proposed in 2011. We are not embarrassed. We are not apologizing. This is what happens when you have additional time and you have an opportunity to get professional assistance to prepare an analysis of what a true special benefit valuation is.

Id. at 104. AR 713.

Thus, the City continues to deny the property owners their process due.

2. Attendance in Executive Session by LID Proponent City Manager who had also been Personally Sued by the Property Owners in April of 2014 Violated Appearance of Fairness Doctrine

The City Council sat as a quasi-judicial body charged with the responsibilities of a Board of Equalization. AR 540, 615-16. "The administrative tribunals which perform judicial or quasi-judicial functions must be as above suspicion and reproach as courts themselves." *Fleck v. King Cnty.*, 16 Wash. App. 668, 670, 558 P.2d 254, 256 (1977). Here, the attendance by the City's now-terminated manager Mark Bauer during the executive session in which the Council apparently decided to confirm the staff-recommended assessment role tainted the proceedings. Generally, city Staff contacting legislative members during the pendency of a

quasi-judicial proceeding violates the appearance of fairness. The remedy is to set aside the assessments.

Here, by way of background, the property owners have all sued former City Manager Mr. Bauer personally for violating their rights in connection with the 2011, unconstitutional, assessments, violated the appearance of fairness doctrine. That lawsuit is pending in Pierce County Superior Court cause no. 14-2-07968-6. This case predates the September 17, hearing by months. Mr. Bauer should not have attended the executive session during the pendency of a decision on the assessments.

The City Council recessed to executive session[9] for a time after the September 17, 2014 meeting, and conducted a meeting on October 2, 2014 for the sole purpose of executive session to discuss the assessment role. *TR of City Sept. 17 Council Meeting* 165. AR 773. The [former] City manager attended this session.

The City Manager should not have attended this so-called executive session. The City manager is a proponent of the LID. The City manager's actions previously were ruled to violate the Property Owners' due process rights. The former City Manager has been sued by the property owners under 42 USC 1983 as a result of the

[9] RCW 42.30.110.

first sewer assessments. The City manager's attendance violated the appearance of fairness doctrine, both the letter of the law and the court's interpretation.

RCW 42.36.060 provides:

> During the pendency of any quasi-judicial proceeding, no member of a decision-making body may engage in ex parte communications with opponents or proponents with respect to the proposal which is the subject of the proceeding unless that person:
>
> (1) Places on the record the substance of any written or oral ex parte communications concerning the decision of action; and
>
> (2) Provides that a public announcement of the content of the communication and of the parties' rights to rebut the substance of the communication shall be made at each hearing where action is considered or taken on the subject to which the communication related. This prohibition does not preclude a member of a decision-making body from seeking in a public hearing specific information or data from such parties relative to the decision if both the request and the results are a part of the record. Nor does such prohibition preclude correspondence between a citizen and his or her elected official if any such correspondence is made a part of the record when it pertains to the subject matter of a quasi-judicial proceeding.

"It is axiomatic that, whenever the law requires a hearing of any sort as a condition precedent to the power to proceed, it means a fair hearing, a hearing not only fair in substance, but fair in appearance as well. A public hearing, if the public is entitled by law

to participate, means then a fair and impartial hearing." *Smith v. Skagit Cnty.*, 75 Wash. 2d 715, 739, 453 P.2d 832 (1969). The applicability of the appearance of fairness doctrine to the Edgewood City Council's actions in adopting the assessment role turns on whether the hearing on is characterized as legislative or quasi-judicial. *Raynes v. City of Leavenworth*, 118 Wash. 2d 237, 245, 821 P.2d 1204 (1992). RCW 42.36 codifies the appearance of fairness doctrine:

> Application of the appearance of fairness doctrine to local land use decisions shall be limited to the quasi-judicial actions of local decision-making bodies as defined in this section. Quasi-judicial actions of local decision-making bodies are those actions of the legislative body, planning commission, hearing examiner, zoning adjuster, board of adjustment, or boards which determine the legal rights, duties, or privileges of specific parties in a hearing or other contested case proceeding.

"The doctrine does not require a showing that actual influence was exerted to bring about the decision made, but only that some interest may have substantially influenced a board or commission member." *Fleck v. King Cnty.*, 16 Wash. App. 668, 670, 558 P.2d 254, 256 (Siv. 1, 1977); *citing Byers v. Board of Clallam County Comm'rs*, 84 Wash.2d 796, 529 P.2d 823 (1974);

There is a real and actual conflict of interest between the property owners and both the staff that prepared the objectionable

assessment role recommendation, and, in particular, the now-terminated Mr. Bauer, who each of the property owners personally sued for his actions related to this case that were adjudicated by Division II to have violated the property owners rights under the federal constitution. Mr. Bauer has long been a proponent of the sewer project. Mr. Bauer should not have had any ex parte contact with the decision makers in executive session.

The remedy for an appearance of fairness violation is to set-aside the quasi-judicial action. *West Main Associates v. City of Bellevue*, 49 Wn.App. 513, 517, 742 P.2d 1266 (Div. 1, 1987) (Reversing superior court - Holding that planning director communication with decision maker *one month* before decision was not during "pending" quasi-judicial proceeding).

3. Misapplication of Presumptions

Despite the guidance of *Hasit*, the City has again misapplied presumptions as evidence. The Docken Appellant adopt by reference the briefing on this topic contained in the Stokes and Rempel Brief at pp. 17-21. To wit, the City's original assessment role findings of fact and conclusions that were distributed to the public stated:

> None of the testimony taken from the owners of the Appellant Properties refuted that the reassessments

> based on the Macaulay Study were based on a fundamentally wrong basis, or otherwise failed to reflect properly the special benefits resulting from the LID No. 1 improvements. Differing opinions were expressed regarding the special benefit to the Appellant Properties; however, the Board concludes the presumption afforded City staff/LID recommendation was not overcome. Given that, the objections of the owners of the Appellant Properties are overruled.

AR 593-594. The City "edited" this conclusion to remove the presumption language only after the legislative deliberation. AR 13-14. This frame of discussion ignores the directives in *Hasit*.

Hasit is clear: "A board of equalization presumes **the value of the county assessor** to be correct, unless overcome by clear, cogent and convincing evidence". *AR* 66. The City staff is not the county assessor. There are NO presumptions of correctness afforded at the legislative level to the staff reports and recommendations. "Further, applying these elevated standards at the municipal hearing would afford unwarranted deference to a report prepared under contract by a private appraisal firm." *Id.*

There is no presumption of correctness applied to city staff recommendations. The presumption of correctness is only enjoyed by a legislative determination on the assessments. The reviewing court is the one to apply the presumption. The above language is what the City Council took into its executive session on September

17, 2014. While the City corrected itself post-deliberation, the Court should set aside and lower the assessments that are the product of the September 17, 2014 meeting. The assessments are again founded upon an fundamentally wrong basis.

D. MAJOR SUBSTANITIVE FLAWS IN CITY CONSULTANT'S RESTRICTED REPORT & ASSESSMENTS

The City's "assessments", all along, are little more than a naked attempt to distribute the entire Project costs amongst the assessed properties, with no real relationship to if and or how much each property was actually, specially benefited. Washington law firmly establishes that cost distributions are invalid, and instead that assessments must reflect the actual benefits to the property received as a result of the improvement.

1. City Consultant's Inflated Assessments Fails His Own, Self-Created "Test Of Reasonableness".

In the wake of *Hasit*, the City's Consultant re-did the restricted appraisal report as to the appealing property owners. *City Consultant Letter*. AR 3095-3103. The Consultant asserted a "test of reasonableness" for the values assigned to each property. AR 3124 [Duncan], AR 3183 [Suelo Marina, LLC], AR 3211 [Masters & Schmidt], AR 3305 [AKA the Brickhouse], AR 3305 [Docken].

The "test of reasonableness" is not a real test. It appears that the "test of reasonableness" is a metric created by the City Consultant to compare the special benefit with counterpart properties in the City of Kent jurisdictions. *Id.* The City Consultant elsewhere acknowledges that the City of Kent is a "superior" real estate environment: "Although located in a superior Kent market". *City Restricted Report* 83. AR 3182. The Consultant's assessments flunk his own test of reasonableness – they are higher than the range of acceptable special benefits in a "superior" Kent market. The City Consultant's self-defeating findings echo the Property owner assertions that the assessments have no basis in reality, nor actual performance of the property assessments since the sewer has been installed in 20111.

2. The City Consultant Double-Counts Special Assessment

The City Consultant reviewed some sales that were pending around the time of the Consultant's report. The Consultant reproduced the following chart in his Restricted Report:

Pending Sales		
6.19	$6.65	Pending sale of Map Nos. 123/125. Broker indicates feasibility study being conducted for apartment complex. Buyer assuming LID assessment, which is reflected in the sale price. No closing date is set.
7.40	$6.27	Pending sale. Price $9.04/SF if buyers assume LID assessment. Broker would not disclose sale specifics.
6.04	$7.13	Pending sale – price $9.44/SF if buyer assumes LID assessment. Broker would not disclose sale specifics. 250-unit apartment complex proposed in conjunction with pending Sale No. 72/73.

See, e.g., AR 3181. These pending sales involve three LID properties that did not challenge the 2011 assessment, and are therefore subjected to the assessment. The pending, cash sale prices are $6.65, 6.27, and 7.13 per square foot. *Id.* But, since these actual, real prices will not support hundreds of thousands of dollars of purported "special benefit", the Consultant adds again hundreds of thousands of dollars of the 2011 assessment value to the pending sale cash price to arrive at artificially inflated square foot prices over $9.00 per square foot. The consultant's double counting is akin to adding the next 20 years' worth of property taxes to the property and saying that the property is really worth its sale price plus the next years of property tax. This is not a valid evaluation technique.

The Consultant expressly lacks any basis for adding again the assessment. In both cases of double counting, the Consultant states

"Broker would not disclose sale specifics". Therefore, the inflated $9.00 per square foot value is **pure conjecture** to "support" unfair double-counting.

Making matters worse, the Consultant uses his artificially high values as a basis for charging the property owners up to **$10.00** per square foot, which is a full $4.00 per square foot higher than any pending transaction in Edgewood, to the extent pending transactions provide any basis for appraisal. Spread over acres, this double counting wrongly charges the property owners **hundreds of thousands of dollars** in wrongful assessments.

3. Assessment Lacks any Basis in Reality

The property owners have maintained all along that the properties did not enjoy millions of dollars in appreciation as a result of the sewer. The property owners were right. The Docken Appellants' properties have in fact collectively *lost* $571,300 in assessed value according to the presumptively correct Pierce County Assessor since the City accepted its sewer in 2011. *Hasit* is clear: "A board of equalization presumes **the value of the county assessor** to be correct, unless overcome by clear, cogent and convincing evidence". *AR* 66.

E. PROPERTY SPECIFIC RELIEF

1. **Edward & Enid Duncan; Parcel No. 2.**

2011 County Assessor's Value:	**$1,072,900**
2014 County Assessor's Value:	**$842,500**
Actual performance 2011-2014:	**Lost $230,400 in value since sewer installation**

Consultant's Recommended Assessment: $212,700.00

ASSESSMENT Supported by Clear Cogent Evidence: Zero or no more than based on usable area of 2.64 acres **$125,493**

Requested Relief: Reduction in assessment to Zero or no more than $125,493

Highest and Best Use. The Duncan property #2 is designated Business Park (BP). *City Restricted Report.* AR 3106. The BP zone incorporates an employment and commercial uses, such as light industrial, office and retail uses. *Id.* Here, the Duncans operate an asphalt, bark and topsoil business occupying the usable portion of the land. *Id.* This use is consistent with light industrial BP use. **The City's 2014 Valuation confirms that the highest and best use is the "existing use with added expansion/redevelopment potential."** AR 3118.

The property owners' appraiser agrees:

> Based on the City Report's conclusion that the existing use of the property is the Highest and Best Use of the property both *without the LID* and *with the LID*,

> although there may be "potential" for expansion, then the existing use represents the highest and best use. Based on the conclusions in the City's Report, the availability of sewer would not add significantly to the overall value of the property. **In that case, the corresponding Special Benefit assessment would be minimal or zero.**

Heischman Report. AR 1034-1035. The City Consultant also agrees, but then inexplicably assigned a whopping $212,700 "special benefit" assessment to the Duncan property.

> Highest and Best Use (Without the LID)
> *As Improved*: Existing Use.
> Highest and Best Use (with the LID)
> Existing use with added expansion/redevelopment potential

City Restricted Report 19. AR 3118.

Based on the City's own conclusions as to highest and best use and as further reinforced by the property owners' appraiser, Parcel 2 has no special benefit at all is derived from the sewer. Special benefit is defined: "Special benefit" is "the increase in fair market value attributable to the local improvements." *Doolittle v. City of Everett*, 114 Wn.2d 88, 103, 786 P.2d 253 (1990). The assessment should be zero.

At different times the Duncans engaged engineers to investigate potential development opportunities. *Dec'l Duncan*. AR 842-852. The resulting economic burden to meet the requirements

imposed by the City's development regulations failed to give a positive return on the investment, especially given that less than half the Duncan land is available under current City development regulations accordingly.

Assessment Fails to Deduct for Unusable Areas. The City has authored three different valuations of the Duncan Property, and the three City Reports offer very different opinions on how much of the Duncan property is unusable: 6.48 Acres (2008 report), 2.36 acres (2011 report) and now 4.51 acres (2014 report). *See City Restricted Report* 16. AR 3115. The current City Consultant admits to being unsure of why the City values vary: "The preliminary 2008 study indicated an unusable area of 282,343 SF (6.48 acres) although the source of this preliminary estimate is not known." *City Restricted Report* 16. AR 3115. The Duncans will now provide clear, cogent, and convincing evidence to remove the uncertainty upon which the City established the purported Duncan assessment.

The correct Parcel 2 unusable area is 6.48 acres. The Duncan property contains a steep slope, and a standing-water wetland at the bottom of the slope. *See City Critical Area Map,* attached to *Dec'l Duncan.* AR 842-852. The City has chosen to

enact large buffer zones to critical areas. Both the wetland and the slope are City designated critical areas and buffer area. *Id.* The City's critical areas map demonstrates that the City has designated over half of the Duncan's 9.12 acre parcel; 6.48 acres unusable land as a critical area or critical area buffer. This impaired land does not benefit from the addition of a sewer because it cannot be developed. The City's own critical area maps provide the clear, cogent and convincing evidence that no assessment covering for these6.48 acres is supported or valid. The current City assessment which excludes only 4.51 acres should be revised to exclude 6.48 acres, leaving only 2.64 acres potentially subject to City assessment. This deduction would lead to a reduction in the City Assessment of $87,207.

Failure to Deduct for Supporting Infrastructure. The City Consultant notes that over 5,000 square feet of the Duncan land has already been developed into various structures to support the Duncan's long-established business. The City then failed to subtract this building footprint and the footprint of attendant parking, etc. required in Edgewood's Code from the square footage of the land "specially benefitted" by the sewer.

The City Valuation Report assumes compliance with local laws codes. *City Valuation Report* 26. AR 3133. Those local laws included that any future redevelopment must include therefore, the City must exempt additional square feet for parking, loading zone, setback, ingress/egress for existing and future developments. The City's valuation presumes special benefit of 100% square feet without reduction for these lands that cannot be developed under City Code. It is not possible to develop each square foot of (non-critical) land under the City's building codes because (1) EMC prohibits maximum build-out by requiring attendant parking, loading, setbacks, etc., and (2) thousands of square feet have already been developed to the highest and best use.

Conclusion. First the Duncan parcel usable areas already are at highest and best use. Second, City Report arbitrarily inflates and includes the non-critical area of the Duncan property within the valuation conclusion. Based on the actual, unusable areas are provided by the City's own critical area maps, the usable and valued area must be reduced by 31%. See Ex attached to Duncan Dec. AR 844. Third, the City fails to exclude from the assessments area need to support and redevelopment. Fourth, the Duncans' prior investigations of any added expansion or redevelopment potential

over the Duncans' decades-long ownership demonstrates by clear convincing evidence that expanded land use is not economically viable.

Based on the City's own conclusions that the Duncan parcel 2 is already highest and best use, the City Council should reject the Macaulay report's contention that the sewer adds expansion/redevelopment potential. *City Valuation Report* 19. AR 3118. It does not. RCW 35.44 enables the Court to reduce the Assessment on the Duncan parcel by 212,700, or, alternatively, in the remote event that the Court is swayed by the City Consultant's analysis as to the parts of the Duncan parcel that are not underwater and or on a steep slope, the Court should adjust the assessment to be no more than $129,493.

2. <u>The Suelo Marina, LLC; PARCEL No. 31</u>.

2011 County Assessor's Value: $663,800

2014 County Assessor's Value: $627,000

Actual Performance 2011-2014: Lost value of $36,000 since sewer installation

Consultant's Recommended Assessment: $322,595

ASSESSMENT Supported by Clear Cogent Evidence: Zero or Discounted "Test of Reasonableness" $1.00 sf benefit less un-usable area = **$46,326**

Requested Relief: Reduction in assessment to Zero or at most $46,326.

It is presumed that an improvement is a benefit; that an assessment is equal or ratable to an assessment upon other property similarly situated; and that the assessment is fair." Trautman, Assessments in Washington, 40 Wash. L. Rev. 100, 122 (1965). *See Sterling Realty Co. v. Bellevue*, 68 Wn.2d 760, 765, 415 P.2d 627 (1966). Here, for Parcel 31, none of these criteria hold true. As a result, Court should reduce the assessment.

Highest and Best Use. Parcel 31 has already attained its highest and best use without the sewer. The Suelo Marina property is zoned commercial. The commercial zoning allows for employment, services, and retail. *City Restricted Report* 68. AR 3167. Here, without connecting to the sewer, the property owner has repurposed an existing building for commercial, highest and best uses of a barber shop and automobile shop on the property. *Id.* at 77. AR 3185. The sewer did not provide any additional benefit to the property.

Inconsistent with City's own Test of Reasonableness. The City Report includes a so-called "test of reasonableness" that establishes the range of special benefit value increases at $1.00 - $2.75 per square foot. AR 3183.

Here, the City Report fails its own "test of reasonableness" by assigning an unsupported increased value of $4.02 per square foot, while at the same time inconsistently claiming "Commercial land in nearby market areas where large infrastructure projects have completed in recent years, such as Kent, have reflected $1.00 to $2.75 or more in value increases...." AR 3179-3182. Therefore, $4.02 per square foot in value increase for Parcel 31 is neither supported by the City nor an appropriate number to apply as the special benefit multiplier.

Presumes Artificially Low "Before". The City Council should reject the contention that the buildings existing on the property in 2011 were without value, as contended at *City Valuation Report* 77. AR 3176. First, these buildings support the zoned, commercial use. Second, the Macaulay and Associates did not personally inspect any of the properties in 2011, and lack foundation to deem any buildings "worthless". AR 3177. Including an artificially low "before" value is a transparent tactic to inappropriately devalue the property well below its County-assessed value and create an artificially high gap between the "before" and "after" values. The artificially low before value is not supported and further fails the City's own "Test of Reasonableness."

Assessment Double Counts. This Suelo Marina Property suffers greatly from the City Consultant's bold-faced double-counting of benefit. The Consultant claims that the property's after value is $10.00 per square foot. The City Consultant attempts to inflate special benefit by using three (claimed) then-pending land sales in the LID. AR 3181. The Restricted Report first notes that a pending sale price of a "comparable" property at a cash price $6.27 per square foot. The Consultant comments "Pending Sale. Price $9.04/SF if buyers assume LID assessment." In other words, the Consultant has added the total of payments or the assessment principal to the sales cost, and then divided this lump sum over the square feet of the property. Based upon this logic, the Consultant assesses the Suelo Marina property as vacant land, with "before" value of 6.00 per sqft, and "after" value of $10.00 per sqft. *See City Valuation Report* 80-83. AR 3179-3182.

The double-counting problem is that if a buyer were to "assume" the proposed $322,000 assessment on the Suelo Marina property on top of the inflated $10.00 per square foot "after LID" cash price provided in the Macaulay report, the buyer would be effectively paying at least **$12.84** per square foot for Suelo Marina's property. That price is much, much higher than any comparable

sale. For these reasons, the City's assessment is flawed and should be significantly reduced.

Conclusion. An assessment for Parcel 31 supported by clear and convincing evidence would be within a ranges as follows:

Zero Assessment. Parcel 31 has already attained its highest and best use without the sewer. The Parcel 31 Suelo Marina property is zoned commercial. The commercial zoning allows for employment, services, and retail. *City Restricted Report* 68. AR 3167. Here, without connecting to the sewer, the property owners has repurposed an existing building for commercial, highest and best uses of a barber shop and automobile shop on the property. The sewer did not provide any additional benefit to this property. As there is no special benefit the assessment should **be zero.**

$1.00 per square foot special benefit. A less appropriate alternative based on the City's own evidence, is a fall back assessment of $1.00 a square foot for a portion of Parcel 31. This reflects what could be attained in the admitted "superior" Kent market, discounted for the Edgewood market with a similar improvement, and also reflects that parcel 31 property is already at its highest and best use without the sewer. AR 3182. The usable property, subtracting a utility easement and existing highest and

best use is approximately 65,340 square feet. Applying the City's .709 multiplier to the acceptable special benefit applied to usable property results in an assessment of **no more than $46,326.**

3. Schmidt & Masters; Parcel No. 71 & 79.
2011 County Assessor's Value (collective) $946,900
2014 County Assessor's Value: $877,500
Actual Performance 2011-2014:Lost value of $69,400

Consultant's Recommended Assessment: $428,945.00

Assessment Supported by Clear, Cogent Evidence: Zero or discounted test of Reasonableness value of $46,731, less the amount needed to improve the landlocked lot to obtain the sewer benefits.

Requested Relief Reduction in Assessment to ZERO or no more than $9,416.00

The City Consultant Dramatically Misstates Tax Assessor Values by $549,000.00. The City Consultant claims:

Real Estate Appraised. The subject property is legally described as portions of the Northeast Quarter of the Southeast Quarter of the Northeast Quarter of Section 9, Township 20 North, Range 4 East, W.M., in Pierce County, Washington. A complete legal description is contained in the appraiser's files. Following is a summary of the property's 2011 assessed value and tax burden.

Tax Account Number	Land	Improvements	Total	Real Estate Taxes
0420091012	$788,100	$74,900	$863,000	11,092.38
0420091051	$649,700	$100	$649,800	$9,083.38
Totals	$1,437,800	$75,000	$1,512,800	$20,175.76

This is wrong, by more than **half a million dollars.** AR 3202. Attached to *Dec'l Masters* is a Pierce County Assessor's tax history confirming a 2011 tax value for parcel 0420091051 of just

$100,700, and not $649,700. AR 840. Therefore, the City Consultant has made a massive, $549,000 mistake. The 2011 land and improvement values in 2011 were just $946,400, and not the inflated $1,437,800 that the City Consultant claims, and then based his disproportionate, $428,945.00 assessment upon.

Inconsistent with City Consultant's Own Test of Reasonableness. The benefit assigned by the City to the Schmidt & Masters properties 71 and 79 exceeds the Macaulay Report's own "Test of Reasonableness" range of $1.00 - $2.75 per square foot benefit, therefore should be disregarded. AR 3211. The City Consultant's includes a "Test of Reasonableness" by which the City Consultant claims to support his Special Benefit values for most parcels. See City Report page 55/AR 3211:

> Test of Reasonableness
> .... Commercial land in nearby market areas where large infrastructure projects have been completed in recent years, such as Kent, have reflected $1.00/SF to $2.75/SF or more in value increases for mitigation costs that allow development of affected sites to their highest and best use. These costs are commonly included in the market's purchase decision as they provide needed infrastructure e (roads/utilities) for site development.

In various places in the City Report, the Consultant applies his self-created Test of Reasonableness to confirm the reasonableness of his present conclusions as to the LID Properties.

However, the City Report contains no source, citation, or documentation in support of the "Test of Reasonableness" or the numbers included therein. It is assumed these numbers are based on past City Consultant projects, but readers are left to guess.

Further, The City Report also does not anywhere describe how or if the "nearby market areas, such as Kent" relate in any way to the Edgewood market. In reality, comparing Edgewood to Kent is inappropriate.

The City Consultant even admits in his City Report that "Kent is a superior market". See Report at 112. AR 3211. Thus, valuing Edgewood property using a "superior" market's Test of Reasonableness is not a valuation supported by clear and convincing evidence.

The City Consultant's Special benefit amount of $3.73 for this Parcel 71/79 fails the City's own "test of reasonableness" test in any event. Instead, the City Report arrives at an increased special benefit value of $3.73 per square foot. If Court generously applies a low-end "test of reasonableness figure" of $1.00 per square foot, the proper assessment is $175,432, multiplied by the City's .709 factor for a result of **$124,381.**

Assessment Should be Reduced by Dollars Needed to Install Sewer. The A less appropriate alternative based on the City's own evidence, is a fall back assessment of $1.00 a square foot for a portion of Parcel 71 and 79. This reflects what could be attained in the admitted "superior" Kent market, discounted for the Edgewood market with a similar improvement, and also reflects that my property is already at its highest and best use without the sewer. AR 3211. The usable Parcel 71 and 79 property, subtracting a utility easement and existing highest and best use is approximately 122,802 square feet. Applying the City's .709 multiplier to the acceptable special benefit applied to usable property results in an assessment of $87,066.

The Supreme Court of Washington clearly states that modifications to particular parcels necessary to enjoy improvements are to be **deducted** as a set off from the special assessment value. *Kusky v. City of Goldendale*, 85 Wn.App. 493, 499, 933 P.2d 430 (Div. 3, 1997). LID Parcel number 71 and 79 require over six hundred feet of extension from the proposed sewer hook in order to enjoy the benefit of the sewer. *See City Restricted Report* 97-98. AR 3196-3197. Based upon the City's own linear foot cost for sewer line, Parcels 71 and 79 need at least a $77,650

investment to benefit from the proposed improvement, and thus the special benefit for the Parcel 71 and 79 should be reduced by a corresponding amount. Thus, the $77,650 investment required to install the sewer lines should then be subtracted, for a total assessment of $9,416.00.

The City Valuation Report impermissibly fails to deduct from alleged special benefit property owner's heavy investment needed to enjoy proposed sewer improvements. This deduction from valuation is required under Washington law.

City Simply Distributes a Full Sewer Cost. Rather than calculating the actual parcel-specific special benefits, the City simply divided the costs of the sewer project by the number of LID properties to arbitrarily apply a percent hypothetical increase in value due to the sewer improvement. The Washington Supreme Court has established that an LID assessment will fail for being arbitrary and capricious if it simply distributes cost, and does not take into account the actual benefit conferred upon each property. *Bellevue Plaza*, 85 Wn.2d at 415, *Abbenhaus v. City of Yakima*, 89 Wn.2d 885, 860-861, 576 P.2d 888 (1978).

This binding law has been applied to invalidate LID assessments on multiple occasions. *Douglass v. Spokane County*,

115 Wn.App. 900, 64 P.3d 71 (Div. 3, 2003). The Supreme Court of Washington makes clear that a City acts arbitrarily and capriciously when its council approves an assessment without requiring proof that the assessed property is actually and specially benefited "by a specific amount." *Bellevue Plaza, Inc. v. City of Bellevue*, 121 Wn.2d 397, 404, 851 P.2d 662 (1993). The City Council is strongly urged to reject the cost distribution of the assessment role, particularly as it applies to parcel 71 and 79.

For example, TC-zoned Parcel 84, which is located a short distance from parcel 71, is somehow valued at a completely different starting value of $3.30/sqft, as opposed to $ but still reportedly receives a virtually identical 90 percent increase in value following the proposed improvement. AR 25-26. The so-called special benefit study has yielded essentially identical percentage increases in value for two properties, despite material differences in lot shape, lot proximity to sewer hook-up, and investment needed to enjoy the proposed improvement. The Supreme Court of Washington clearly states that modifications to particular parcels necessary to enjoy improvements are to be taken into account in the form of a set off from the special assessment value. *Kusky*, 85 Wn.2d at 500.

Clearly the City's Consultant applied a purely mathematical model to impermissibly arrive at the special benefit of Parcel 71.

The City Restricted Report from which the assessments are derived clearly distributes costs and not special benefits to specific property. The Court should reject the valuation. See *Bellevue Plaza*, 121 Wn.2d 415 (Assessment nullified where City's Consultant fails to deny City Valuation Report is mere mathematical method for distributing costs). No other explanation exist other than cost distribution for the identical percentage of special benefit to parcel 71 , which requires substantial expense on the order of one quarter of its so-called special benefit in order to enjoy the proposed improvement. Such an assessment is clearly prohibited by Washington law.

Conclusion. The Parcel 71/79 assessment supported by clear and cogent evidence is:

Zero Assessment. Those portions of the property with existing commercial use and wetlands receive no special benefit from the sewer and therefore should not be assessed anything. A Zero assessment is the best amount supported by clear cogent evidence and should be applied to 52,629 square feet of Parcel 71 and 79.

$1.00 per square foot assessment. A less appropriate alternative based on the City's own evidence, is a fall back assessment of $1.00 a square foot for a portion of Parcel 71 and 79. This reflects what could be attained in the admitted "superior" Kent market, discounted for the Edgewood market with a similar improvement, and also reflects that my property is already at its highest and best use without the sewer. AR 3211. The usable Parcel 71 and 79property, subtracting a utility easement and existing highest and best use is approximately 122,802 square feet. Applying the City's .709 multiplier to the acceptable special benefit applied to usable property results in an assessment of $87,066. From this total, the $77,650 investment required to install the sewer lines should then be subtracted, for a total assessment of $9,416.00.

4. AKA the Brickhouse, LLC; Parcel No 128.

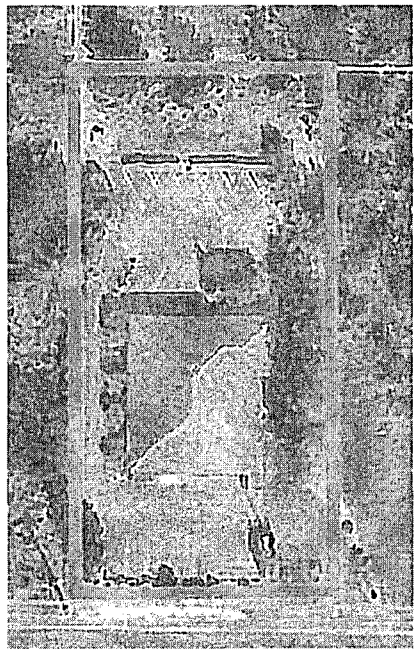
2011 County Assessor's Value:	**$591,800**
2014 County Assessor's Value:	**$470,700**
Actual Performance 2011-2014:	**Lost $121,100 in value since sewer installation**

Consultant's Recommended Assessment: $28,360

Assessment Supported by Clear, Cogent, Evidence: Zero

Requested Relief: Reduction in Assessment to Zero

Highest and Best Use. The AKA the Brickhouse, LLC, Parcel 128, property has been fully developed to its highest and best use per the City Consultant. *City Restricted Report* 99. AR 3298. The property contains a modern medical office building and attendant parking lot. There is no extra space to develop. AR 3297.



See City Restricted Report 189. AR 3288. Accordingly, the Parcel 128 Brickhouse, LLC has zero special benefit, and no assessment is supported. This property is already completely developed for its highest and best use: "Highest and Best Use (with the LID)...existing use." *City Restricted Report* 199. AR 3298. The City's Restricted Report concedes the present use is the highest and best. *Id.*

The City Restricted Report thus concedes that this commercial property will not see any increase in the rent as a result of the LID sewer. *City Restricted Report* 212. AR 3311. (Potential gross income same with and without LID). "[I]n valuing property subject to a long-term lease, contract rent should be presumed the proper base figure for valuation in the absence of clear, convincing evidence that market rent exceeds contract rent." *Folsom* 106 Wn. 2d at 769. Therefore, because there are no special benefits as a result of adding sewer, the assessment should be zero. The Property Owners appraiser, Donald Heischman, MAI, principle of Strickland, Heischman and Hoss, Inc. agrees:

> As market participants are primarily concerned with the return on their investment, or the net operating income they can receive from a property, assuming that the existing septic system was in good working condition, the City's conclusion of highest and best use does not support that sewer being available to the property would increase the value of the property from the *without LID* scenario. **Based on the City's conclusion, the corresponding Special Benefit assessment for Parcel 128 would be minimal or zero.**

Heischman Report. AR 1040.

Assessment Fails to Discount for Costs of Sewer Improvements. Due to neighbors needing to use the septic

easement for some other purpose, this Property owner previously inquired into what costs are associated with sewer connection. *Dec'l Dr. Acosta.* AR 829-833. Between permitting, materials, and labor, the owner will need to spend approximately $22,000 to connect to the City sewer. *Dec'l Acosta* AR 829-833. This completely offsets the City Consultant's proposed assessment of $28,360.

The City Consultant's conclusion of highest and best use being attained without the sewer and its required hookup at a cost of thousands of dollars does not support any increase in the value of the property.

Conclusion: Since the sewer has not added expansion potential or allowed the rent to increased, Parcel 128 does not specially benefit from the sewer installation. Also, the cost associated with connecting to the sewer is substantial and must be off-set. Since assessment cannot exceed the (nonexistent, negative) benefit to the property, the assessment best supported by clear cogent evidence and both the City's Consultant and the property owners' Appraiser is **zero**.

5. Docken Properties, LP; Parcel No. 131, 133, 140.

2011 County Assessor's Value (collective):	**$1,533,900**
2014 County Assessor's Value:	**$1,420,300**

Actual Performance 2011-2014: **Lost $113,600 in value since sewer installation**

Consultant's Recommended Assessment: **$202,065**

Assessments Supported by Clear, Cogent Evidence:

131: Zero
133: Zero, but no more than **$52,776**
140: Zero, but no more than **$10,932**

Requested Relief: **Reduction in assessments to zero**

Highest and Best Use. Docken Properties, LP, owns three contiguous parcels in LID No. 1. All of the Docken parcels are used for commercial uses, consistent with their zoning.

Parcel 131. Parcel 131 contains office buildings, with two sewer systems and both have been working well for many years and both in good condition. One is over sized to accommodate any desired increase in usage. According to the property owner, Eric Docken, the City's sewer system is an unneeded and unwelcome expense. *Dec'l Docken.* AR 819.

The City's Consultant acknowledges that this Parcel 31 has ***already attained its highest and best use,*** without the City's LID sewer. *See City Restricted Report* 237/AR 3335: "The existing improvements on Map No. 131 are an example of the site's highest and best use "as improved." The City's own Consultant agrees that Parcel 131 already has attained highest and best use. On page 255

the City Consultant indicates that the amount of rent obtainable would not change whether sewer was available or not, resulting in the net operating income being the same with or without sewer being in place. AR 3353.

The Docken's appraiser, Donald Heischman, MAI, principle of Strickland, Heischman and Hoss, Inc. agrees:

> Again, as market participants are primarily concerned with the return on their investment, or the net operating income they can receive from a property, assuming that the existing septic system was in good working condition, the City's conclusion does not support ewer being available to the property would increase the value of Parcel 131 from the *without LID* scenario**. Based on the City's conclusion, the corresponding Special Benefit assessment for Parcel 131 would be minimal or zero.**

Heischman Report. AR 1041.

Since assessment cannot exceed the (nonexistent) benefit to the property, the Parcel 131 assessment which is best supported by clear cogent evidence and both the City's Consultant and my appraiser is zero.

Our Supreme Court recognizes that the value of commercial properties is driven by the rent, and not what the raw land might be sold for. "Nevertheless, we believe that, in valuing property subject to a long-term lease, contract rent should be presumed the proper base figure for valuation in the absence of clear, convincing

evidence that market rent exceeds contract rent." *Folsom v. Spokane Cnty.*, 106 Wn. 2d 760, 769, 725 P.2d 987 (1986).

The Property Owner's expert appraiser agrees: "the amount of rent or income generated by the property would not change whether sewer was available or not, resulting in the income received from the property being the same with or without sewer being in place. As market participants are primarily concerned with the return on their investment, or the income they can receive from a property..." *Dec'l Docken* 4. AR 819. In other words, because these properties are receiving the same market rent, now without sewer, as they would with sewer, there is zero special benefit to these properties as a result of the sewer infrastructure. No assessment is supported by the conclusions of the City's on consulting and confirmed by the property owners' appraiser.

Lower "Before" Value indicated By City's Own Report. Property owner Appraiser Don Heischman also states that the City's Consultant Report inconsistently valued Parcels 133 and 140 too low in the "before" scenario. AR 819. If Parcel 133 & 140 properties were valued similarly to Brickhouse LLC property, Parcel 128, which is also zoned MUR at a higher per square foot rate in the *without LID* scenario, the difference between their *without LID*

value and *with LID* value would be lower. This would result in a lower special benefit assessment.

> **Lower Value Indicated- Parcel 133 & 140**. The second item is related to the parcels listed as Maps 133 and 140. These properties contain areas of 37,595 square feet and 13,067 square feet respectively. These parcels are both zoned Mixed-Use Residential (MUR). The Aka The Brickhouse LLC property, Parcel 128, is also zoned MUR and contains an area of 23,563 square feet, bracketed in size by the two smaller Docken properties, Parcels 133 and 140.
>
> In the *with LID* scenario the Brickhouse property is valued at $8.70 per square foot which is bracketed by the Docken properties which are $7.98 per square foot and $9.18 per square foot respectively. The difference in unit values appears reasonable based on the size of the properties.
>
> However, in the *without LID* scenario the Parcel 128 Brickhouse property is valued at $7.43 per square foot which is higher than the Parcel 133 & 140 Docken properties which are $5.00 per square foot and $6.00 per square foot. If the Parcel 133 & 140 Docken properties were valued similarly at a higher per square foot rate in the *without LID* scenario, the difference between their *without LID value* and *with LID* value would be lower. This would result in a lower special benefit assessment.

Heischman Report 10. AR 1041.

To illustrate:

	City Value Before	City Value After	City Difference (special benefit)	Best Evidence Before Value	**Best Evidence Value Difference (special benefit)**
Parcel 133 Docken 37,595 square feet	5.00	7.98	2.98	6.00	**1.98x 37,595 sf = $74,438 x .709= $52,776**

Parcel 128 Brickhouse 23,563 square feet	7.43	8.70	1.27	7.43	
Parcel 140 Docken 13,067 square feet	6.00	9.18	3.18	8.00	**1.18 x 13,067sf = $15,419 x.709= $10,932**

Double Counted. Even if a special benefits assessment were supported, which it is not, the flaws exist in the City's Report. The City's Report double-counts the special benefit purported to accrue to the Docken properties. The City Consultant attempts to inflate special benefit by using three (claimed) currently pending land sales in the LID. *See City Restricted Report* 243. AR 3341. These three sales are apparently pending feasibility studies to be turned into apartment buildings.

The Macaulay Report first notes that a pending sale price of a "comparable" property at a cash price $6.27 per square foot. AR 3341. The Consultant comments "Pending Sale. Price $9.04/SF if buyers assume LID assessment." In other words, the Consultant has added the total of payments or the assessment principal to the sales cost, and then divided this lump sum over the square feet of the property. Based upon this math, the Consultant assesses the Docken property as vacant land, with "before" value of 6.00 per sqft, and "after" value of 9.00 per sqft., in the case of Parcel 140. *See City Valuation Report* 246. AR 3344.

If a buyer were to likewise "assume" the proposed $202,000.00 assessment on the Docken properties 133 & 140, on top of the inflated $9.00 per square foot "after LID" cash price provided in the Macaulay report, the buyer would be effectively paying nearly $11.00 per square foot for the Docken property. That price is much, much higher than any comparable sale.

The City's Consultant has made at least an additional two errors in his special benefit valuation:

City Impermissibly Speculates. An assessment role may only assess to the extent that a property is specially benefitted. RCW 35.44.010. "The benefit to the land must be actual, physical and material and ***not merely speculative*** or conjectural." *Heavens v. King Cnty.* Rural Library Dist., 66 Wash. 2d 558, 563, 404 P.2d 453, 456 (1965).

Here, the City Consultant suggests that a good use of the LID property 131 would be to hold the property until sufficient market demand exists to build out more single family housing units "when market conditions indicate sufficient demand." Page 236. AR 3334. Therefore, the City Consultant admits that neither the market conditions on May 10, 2011, nor zoning arrangement, currently

support the density afforded by Edgewood zoning scheme and the resulting inflated special benefit.

No Evidence of Poor Soils. Further, the City Consultant states that sewer allows a higher density due to "soil conditions and probable Pierce County Health Department requirements" likely lowering density without the sewer LID. *City Valuation Report* 236. AR 3334. But, the City's Consultant does not establish any foundation for his opinion of the soil condition, nor support of the claim of the "probable" Pierce County regulations, nor show how that unsupported claim relates to this Docken property #131. *See City Valuation Report* 233/AR 3331 (describing development and reporting process to prepare City Valuation Report.) This is pure consultant speculation and is not sufficient to describe special benefit. The Consultant's unsupported speculation about poor soil quality is not cogent evidence sufficient to deflate No. 131's "before" value, which then artificially increases the special benefit assessment.

Assessment Not Discounted for Unusable Land. No. 131 also contains large buildings that the consultant considers highest and best use for the property. These buildings house multiple businesses, and, per Edgewood Municipal Code ("EMC"),

must set aside land for parking, loading, setback and landscaping. These pre-existing land uses are not benefitted at all by the sewer. No assessment is warranted, however if the No. 131's assessment should be drastically reduced to account for the existing highest and best use of the property.

No. 133 and 140. For these parcels, the City Consultant commits the precise error that Washington's Supreme Court rejected in *Dolittle v. Everett*: "The Supreme Court, Brachtenbach, J., held that possible future integrated use of separate parcels of land should not have been considered in deciding whether separate parcels constituted a single tract and should be so treated in assessing for special benefits in local improvement district." *Doolittle v. City of Everett*, 114 Wash. 2d 88, 786 P.2d 253 (1990). Here, the Consultant suggests: "Highest and best use of Map Nos. 133 and 140, "as vacant", is as a larger parcel entity for investment hold for future commercial or mixed use commercial/multifamily development. *City Restricted Report* 236. AR 3334. This method of "valuation" must be discarded and ignored, per the Supreme Court of Washington. The City Consultant's approach to valuation which requires consolidation into a single tract of parcels 133 and 140 is invalid.

Parcel No. 133 contains a house used as an office. AR 3333. Parcel 133 is zoned MUR, which provides for a mix of residential and office uses. *Id.* Viewed by itself, as it must be, Parcel 133 should not have any assessment, since it is already developed and being used consistent with its zoning.

Parcel 140 is a 1/3 acre vacant lot zoned MUR. AR 3333. Parcel 140 is level land is used for storage, no service is needed or desired since the highest income and use for this lot has no use of sewer. *See Declaration of Docken.* AR 816-820. Thus, any cost from LID or monthly charges is a property **devaluation** not increase in value.

In summary, the Docken LP properties do not benefit from the new sewer, at all. If the LID were applied, the realized rent for the property owners is far lower than is realized now, due to the City's proposed assessment.

Conclusion. 131: Since assessment cannot exceed the (nonexistent) benefit to my property, the Parcel 131 assessment best supported by clear cogent evidence and both the City's Consultant and the Property Owner's appraiser **is zero.**

Conclusion. 133-140: If Parcel 133 & 140 properties were valued similarly to Brickhouse LLC property, Parcel 128, which is

also zoned MUR at a higher per square foot rate in the *without LID* scenario, the difference between their *without LID value* and *with LID* value would be lower. See *Heischman Report*. This would result in a lower special benefit assessment of: **$52,776 for 133 and $10,932 for 140.**

V. CONCLUSION

Pursuant to RCW 35.44.200, this Court should grant this Appeal of Assessment Roll for City of Edgewood LID No 1. The City's mishandling of the second round of attempted LID assessments invites and requires the Court's intervention. The City's assessment role should be set aside, because the City reintroduced tainted evidence at the assessment role hearing, violated the appearance of fairness doctrine, and, misapplied (again) presumptions regarding the City staff's assessment recommendations.

The Petitioner property owners presented clear cogent and convincing evidence that their properties were not specially benefited, or at the very least, any special benefits were substantially lower that the City proposed. Once the owners presented this evidence, the presumptions of City correctness disappeared, and the burden was on the City to justify its numbers.

Instead, the City failed to present any rebuttal, and thus did not meet its burden to sustain its assessments. "...where a protesting owner alleges her assessment exceeds the special benefit and presents sufficient evidence to overcome the presumptions, but the city confirms the assessment roll regardless, a court will reduce or annul the assessment as arbitrary and capricious unless the city presented sufficient competent evidence to the contrary. *Bellevue Plaza*, 121 Wash.2d at 403–04, 851 P.2d 662.

The property owners have suffered through years of uncertainty. Rather than merely nullify the assessments, this Appeals Court should truncate this process by adopting the assessments supported by the clear, cogent and convincing evidence that *Hasit* expressly called for, and that the Property Owners set forth in the record below.

Respondents also adopt by reference all issues and analysis raised by all other Petitioners in this consolidated LID appeal.

RESPECTFULLY SUBMITTED this 19th day of January 2016.

GOODSTEIN LAW GROUP PLLC

By: _____

Carolyn A. Lake, WSBA #13980
Seth Goodstein, WSBA #45091
Attorneys for Petitioners Docken

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ENID DUNCAN, et al.,

Appellants,

v.

CITY OF EDGEWOOD, (Local Improvement District #1)

Respondent.

No. 48025-0-II

DECLARATION OF SERVICE

The undersigned declares that I am over the age of 18 years, not a party to this action, and competent to be a witness herein. I caused this Declaration and Courtesy Copies of the following documents:

1. APPELLANTS ERIC DOCKEN ET AL.'S MOTION TO FILE OVERLENGTH BRIEF
2. OPENING BRIEF OF PETITIONERS ERIC DOCKEN, DOCKEN PROPERTIES, LP; ENID AND EDWARD DUNCAN; JAMES AND PATRICIA SCHMIDT; DARLENE MASTERS; AKA THE BRICKHOUSE, LLC; SUELO MARINA, LLC

to be served on January 19, 2016 on the following parties and in the manner indicated below:

P. Stephen (Steve) DiJulio
Lee R. Marchisio
Foster Pepper PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101-3299
Email:dijup@foster.com
marcl@foster.com

[X] by United States First Class Mail
[ ] by Legal Messenger
[ ] by Facsimile
[X] by Electronic Mail

ORIGINAL

Joseph Zachary Lell, Edgewood Attorney
Jeff Capell Special LID Counsel for Edgewood c/o Zach Lell
Ogden Murphy Wallace
901 Fifth Avenue, Suite 3500
Seattle, WA 98164
Email:zlell@omwlaw.com

[X] by United States First Class Mail
[ ] by Legal Messenger
[ ] by Facsimile
[X] by Electronic Mail

Margaret Archer
Gordon, Thomas, Honeywell LLP
1201 Pacific Ave, #2100
Tacoma, Washington 98402
Email: marcher@gth-law.com

[X] by United States First Class Mail
[ ] by Legal Messenger
[ ] by Facsimile
[X] by Electronic Mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 19th day of January 2016 at Tacoma, Washington.

Carolyn A. Lake